In the

Supreme Court of the United States

January Term, 1978

No. 77-1180

ANTHONY P. LaFATCH,
Petitioner,

v.

MM CORPORATION,
Respondent,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lyman Brownfield
Terry L. Goodman
140 East Town Street
Columbus, Ohio 43215
Attorneys for Respondent, MM Corporation

BROWNFIELD, KOSYDAR, BOWEN
BALLY & STURTZ
140 East Town Street
Columbus, Ohio 43215
Of Counsel

INDEX

CITATIONS

CASES **Page**

MISCELLANEOUS

QUESTION PRESENTED

When a state court of competent jurisdiction has rendered a final judgment on the merits of one claim between two persons but has not rendered a final judgment on a second claim between such persons, with respect to which the state court did not have competent jurisdiction, is the res judicata doctrine a bar to a subsequent action in a district court of competent jurisdiction with respect to the second claim?

STATEMENT OF THE CASE

After the acquittal referred to in Petitioner's Statement of the Case, MM Corporation entered an appearance opposing Petitioner's motion for return of the $50,000 on the ground that an action for damages for fraud and to impose a constructive trust upon Petitioner was pending in the Court of Common Pleas of Franklin County, Ohio. The district court held the LaFatch motion in abeyance.

Prior to the conclusion of the state case, the judge withdrew from the consideration of the jury that equitable aspect of Respondent's complaint which sought imposition of a trust. Thereafter, the jury found "the issues in the case on the Complaint in favor of the Plaintiff, MM Corporation and assess the amount of the recovery due to the Plaintiff, MM Corporation from the Defendant at the sum of $15,000" Res. App. 15. The jury verdict did not make any finding "against MM Corporation on its claim to the $50,000 (still being held by the district court)" as the Petitioner states. Even though he had expressly withdrawn from the jury the prayer for imposition of a constructive trust on the Petitioner, the trial judge refused to consider that issue separately, on the ground that he was bound by the jury verdict, *i.e.*, he could not award any relief in addition to

that awarded by the jury.

MM Corporation then asked the District Court to return the money to it.

REASONS AND ARGUMENT FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECLINED TO APPLY THE DOCTRINE OF RES JUDICATA TO THE DECISION OF THE STATE COURT DUE TO THE STATE COURT'S LACK OF JURISDICTION OVER THE RES AND ITS DECISION NOT TO ATTEMPT TO ASSERT THAT JURISDICTION.

In the decision below the Court of Appeals found that the Federal District Court, in possession of a Fifty Thousand Dollar ($50,000.00) fund seized as evidence in a criminal prosecution, was not bound by the res judicata effect of a state court decision. The Court of Appeal's decision was based upon a recognition of the nature of the state court decision, the lack of jurisdiction of the state court over the res as well as the policy considerations involved (discussed in argument II).

The decision below was grounded in a recognition of the fact that the federal district court which controlled the fund was solely vested with the authority to determine its distribution:

> "It is to be emphasized that the res, the $50,000, has remained in the custody of the district court continuously since the time it was introduced into evidence. It is now the obligation of the district court to return this money to its rightful owner. We hold this should be done in the present case, without regard to the decision of

> the State court." (Pet. App. p. 23.)

The state judgment, while determinative on the question of fraud, had no effect on the res which was not subject to its jurisdiction.

The doctrine of res judicata, as its name would indicate, is applied when there is a judgment of issues. The state court refused to exercise its jurisdiction on the equitable issues; as a result, there can be no preclusion of the District Court jurisdiction to decide these issues in its determination of the recipient of the fund in its custody.

Jurisdiction over the disposition of evidence in the custody of the District Court rests solely with the District Court. Jurisdiction over that evidence had been acquired by that Court as a result of the criminal action prior to any action brought in the state court. As a result, extension of jurisdiction by the state court over the same subject matter was precluded, and for this reason was not sought in the state action.

Had the District Court not had and retained jurisdiction over the money as a result of its in personam jurisdiction over LaFatch, proceedings could not properly have been before that Court for the disposition of the money. Although the amount in controversy was in excess of Ten Thousand Dollars ($10,000.00), the parties were not of diverse citizenship in this proceeding of a civil genre and no substantial federal question was before the District Court.

The dispute over disposition of the money is an action in rem. The issue is concerned solely with title to the property. The parties are agreed that the District Court

had jurisdiction over the money at the conclusion of the criminal proceedings. No court was competent to wrest this jurisdiction from the District Court, and the state court was not asked to do so.

Controlling case law dictates that the District Court alone acquired and retained jurisdiction over the specific Fifty Thousand Dollars ($50,000.00) and its disposition. In *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the Supreme Court treated this question. *Kline* involved a suit for breach of contract; an action had been brought in federal district court first and thereafter an action was filed in state court. After a complicated course of counterclaims, removal to the federal court and back again to the state court, a mistrial in the state court, and proceedings to enjoin the state action, the case came before the Supreme Court on the question of whether the district court could enjoin proceedings on the same issues in the state court in an in personam action until disposition of the matter was had in federal court. The *Kline* decision is quoted below:

> "[State courts and those of the United States] do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and *when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.* The regulation of process, and the decision of questions relating to it, are part of the

> jurisdiction of the court from which it issues.
>
> * * *
>
> "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, *the tribunal whose jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted...."*
>
> * * *
>
> "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. [Citations omitted.] *The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam,* in which nothing more than a personal judgment is sought, *there is no objection to a subsequent action in another jurisdiction,* either before or after judgment, although the same issues are to be tried and determined; and this *because it neither ousts the jurisdiction of the court in which the first suit was brought,* nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law." *Kline, supra,* 260 U.S. 226, 230-232; [Emphasis added].

The *Kline* case also stated that where a federal court has acquired jurisdiction of the subject matter of a cause, it may enjoin an action in state court where the effect of the state court action would be to defeat or impair federal jurisdiction.

As this Court noted in the case of *Fall v. Eastin*, 215 U.S. 1 (1909):

> "...[H]owever plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the res, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree is firmly established." 215 U.S. at 11.

The Court continued in stating that as between two state courts, only a decision acting upon a person, as opposed to a particular piece of property, is entitled to full faith and credit in a court of another jurisdiction:

> "...[W]here...the subject matter is specific property and the relief when granted is such that it *must* act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised by the State in which the subject matter is situated." 215 U.S. at 12.

The identical result occurs as between a state court and a federal court having exclusive control over the res.

> "[T]he principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189, 195 (1934).

> "The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating

> thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power." *Farmers Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900).

The state court civil action for fraud did not confer or seek to confer jurisdiction over the res on the state court. Plaintiffs in that action could not and did not seek any remedy as to the Fifty Thousand Dollars ($50,000.00) in the custody of the District Court. *Kline* dictates that the District Court disregard any ruling of the state court with respect to the res because the state court had no jurisdiction over the res.

The state court lacked jurisdiction for two reasons: 1) the res was in the exclusive jurisdiction of the federal District Court and, therefore, the state court was precluded from attaching jurisdiction, and 2) the state court was not asked to make disposition of the res in the federal court—that question was not before it. With the realization that the state court had in personam jurisdiction over LaFatch but lacked jurisdiction over the Fifty Thousand Dollars ($50,000.00) in the custody of the District Court, Plaintiffs prayed the state court to have any claim that LaFatch might have or make to the Fifty Thousand Dollars ($50,000.00) held in constructive trust for Plaintiff MM. Had judgment been awarded in favor of Plaintiff MM on that prayer, the judgment would not have empowered MM to attach the Fifty Thousand Dollars ($50,000.00) in the District Court.

II. EVEN HAD THE STATE COURT ASSERTED JURISDICTION OVER THE RES, EITHER BY CHOICE OR BY LAW, PUBLIC POLICY CONSIDERATIONS MANDATED THAT THE DOCTRINE OF RES JUDICATA NOT BE APPLIED BY THE FEDERAL COURT.

Petitioner argues that the Court of Appeals has created a "rare exception" to the application of the res judicata doctrine and has further invaded the province of the Supreme Court with respect to the claimed new exception. By making such grave assertions, petitioner encourages this Court to review mere policy matters considered by the court below and directs attention away from the substantial justice accomplished there. Moreover, neither assertion is accurate. Petitioner cites *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1949) for the proposition that the Supreme Court has "reserved to itself the exclusive right to determine any exceptions" to the application of the res judicata doctrine. *Magnolia* is one of a line of cases involving inconsistent adjudications in sister states, *see, also, Milwaukee County v. White Co.,* 296 U.S. 268 (1935) and *Williams v. North Carolina,* 317 U.S. 287 (1942). Thus, the result in *Magnolia* directly turned on principles of full faith and credit and comity, not on principles of res judicata. The court below was not confronted with a "local policy meriting recognition as a permissible limitation upon the full faith and credit clause," *Milwaukee County,* 296 U.S. at 274, and it therefore did not invade any area properly reserved by the Supreme Court.

Secondly, the court below did not "create an exception" to the res judicata doctrine. The Supreme Court held in the case of *Mercoid Corporation v. Mid-Continent Investment Company,* 320 U.S. 661 (1944) that the res judicata doctrine ought not be applied where the effect of its application would be inconsistent with

public policy, *Id.* at 670 (res judicata offered as bar to patent infringement claim). Res judicata is a judicially-created concept which is grounded upon public policy considerations. *Partmar Corp. v. Paramount Theatres, Inc.,* 347 U.S. 89 (1953).

There have been a number of cases in lower federal courts which incorporate this balancing of the policies underlying res judicata with other public policies, *see,* e.g., *Moch v. East Baton Rouge School Board,* 548 F.2d 594 (5th Cir. 1977) *cert den'd.* 46 U.S.L.W. 3218 (10-3-77); *Smith v. Pittsburgh Gage and Supply Co.,* 464 F.2d 870 (3d Cir. 1972). The court below had utilized this equitable balancing approach on at least three other occasions. (Pet. app. 20-21.)

A fundamental aspect of the policy underlying res judicata is the interest in "avoiding repetitious litigation". *Partmar Corp.,* 347 U.S. at 91. The goal of "economy of judicial time" is a paramount value underlying res judicata. *Commissioner of I.R.S. v. Sunnen,* 333 U.S. 591 (1947). The Court of Appeals below recognized the effect of this policy goal upon the instant case:

> "The interests of judicial efficiency dictate that the problem be resolved by the criminal trial court. [citation omitted]
>
> '...It makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case.' " (Pet. App. p. 20.)

The fundamental policy of judicial economy underlying the doctrine of res judicata runs in favor of prohibiting the control by the state court over the fund. The pertinence of this overriding policy to the facts at hand requires the result reached by the Court of Appeals below.

The Court of Appeals further pointed to other policy considerations involved in its decision not to award the Fifty Thousand Dollar ($50,000.00) fund to the defendant in the original criminal case.

> "Furthermore, application of res judicata in the present case would violate overriding public policy. Solicitation of bribes or payoffs in public matters is manifestly contrary to the public interest. In these times of increasing white collar crime, private citizens should be encouraged to co-operate with law enforcement officers in thwarting attempts at bribery and extortion." (Pet. App. p. 22.)

Public policy cannot tolerate any other outcome. The burden on a private person of reporting apparent criminal activity to law enforcement agencies is substantial enough without this risk. It is unconscionable to place such a financial burden on a private person for cooperation with law enforcement efforts against white collar crime. Thus, the result below is not a "rare exception" to the res judicata doctrine, but is consistent with its fundamental equitable principle.

Equity dictates that the District Court return the Fifty Thousand Dollars ($50,000.00) to the person who supplied and paid it. MM, a private person, reported LaFatch's solicitation of this money to the FBI. MM borrowed such funds and, under surveillance of and in cooperation with the FBI, paid the funds to LaFatch. Obviously, this cooperation placed a substantial burden on MM. The manifest injustice of any other result is clear.

The Court of Appeals decision accomplishes what

should be recognized as a rather pedestrian result in a situation which common sense indicates should have only one result. Substantial public interest in the issue would exist only if the contrary result had been reached.

As noted by Professor Moore and cited by the Court below:

> "Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party." (Footnotes omitted.) IB J. Moore, Federal Practice, ¶0.405[11] (1974).

The court below, consistent with this Court's position on res judicata as manifested in *Fall v. Eastin, supra,* found such overriding considerations present in the instant case.

Because the court below found that the state court never had jurisdiction to determine ownership of the res in custody of the District Court, the state court action and the federal court action must not have involved the same issues. The balancing of res judicata and public policy is particularly apposite in the analysis of precisely what issues were litigated in a prior action, as was expressed in *Dore v. Kleppa,* 522 F.2d 1369 (5th Cir. 1975) in this way:

> "This Court has recently discussed at length the problems of deciding whether the cause of action in one suit is identical to that in another [citations omitted]...In making this decision, it should be remembered that res judicata is a principle of

public policy and should be applied so as to give rather than deny justice..."

Of the same effect is *Smith v. Pittsburgh Gage and Supply Co., supra.*

Indeed, no other conclusion as to the effect of the state court's decision is understandable. In awarding compensation of Fifteen Thousand Dollars ($15,000.00) the state trial court clearly did not purport to assert jurisdiction over the fund in control of the federal court. Rather, the state court merely awarded compensation as a result of the fraudulent misuse of the fund perpetrated by the criminal defendant. The jury verdict consisted of an award of additional compensation. The trial judge subsequently declined to place a constructive trust on the Fifty Thousand Dollar ($50,000.00) fund pending its release. Petitioner would have the Court believe that the trial court purported to order the release of the fund to the criminal defendant when it in fact found him liable for fraud, thus imposing an award of Fifteen Thousand Dollars ($15,000.00) independently of whatever action was to be taken in disposition of the fund. If the doctrine of res judicata were applied to the state court decision as argued by petitioner the result would be a division of the Fifty Thousand Dollar ($50,000.00) fund: Fifteen Thousand Dollars ($15,000.00) to MM Corporation and Thirty-five Thousand Dollars ($35,000.00) to LaFatch. There is no logic in such a result.

CONCLUSION

For these reasons, petitioner's request for issuance of a writ of certiorari to review the holding of the United States Sixth Circuit Court of Appeals should be denied.

Respectfully submitted,

LYMAN BROWNFIELD
TERRY L. GOODMAN
140 East Town Street
Columbus, Ohio 43215
Counsel for Respondent MM Corporation

Of Counsel:
Brownfield, Kosydar, Bowen, Bally & Sturtz
140 East Town Street
Columbus, Ohio 43215

March 15, 1978

APPENDIX

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF

September TERM 1975

John W. Vogel, et al.
Plaintiff

vs.

Anthony LaFatch
Defendant

Case No. 74CV-04-1149
CIVIL ACTION

We the jury, being duly impaneled and sworn, find the issues in this case on the Complaint in favor of the Plaintiff, M.M. Corporation and assess the amount of the recovery due to the Plaintiff, M.M. Corporation from the Defendant at the sum of $15,000.00 Dollars Compensatory and None [sic] Dollars Punitive Damages

And we do so render our verdict upon the concurrence of 6 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 24 day of November, 1975.

1. Douglas E. (illegible)
2. Billie D. Williams, Jr.
3. (illegible)
4. (illegible)
5. Madalyn P. Kuntz
6. Judith C. DeVit
7.
8.

Verdict for Plaintiff
SEAL
9th June, 1976
(illegible)